

Appl. No. 10/791,396
Amdt. Dated March 6, 2007
Reply to Office Action of February 28, 2006

REMARKS/ARGUMENTS

I. Status of Claims

Claims 1 through 60 are pending in this application. After the amendments made herein, claims 1 and 54 are in independent form and the remaining claims are in dependent form.

II. Amendments to Claims

Claims 1-54 and 60 have been amended herein. Independent apparatus claim 1 has been amended to recite a flow module assembly. Previously independent apparatus claims 14, 33, 52 and 53, each directed to a MEMS flow module, now depend from amended claim 1. Independent method claim 54 remains in independent form but has been amended to recite the step of providing the flow module assembly of amended claim 1.

The amendments made in dependent claims 2-13, 15-32, 34-51 and 60 are for the purpose of conforming these claims to the amended independent claims or, in some instances, to correct minor errors which were noticed in some of the original claims.

The amended claims are fully supported by specification, do not introduce new matter, and are believed to be patentable over the prior art.

III. Response to Restriction Requirement

The Examiner has required restriction as among the inventions of Group I (claims 1-13), Group II (claims 14-53) and Group III (claims 54-60). The restriction requirement is respectfully traversed insofar as it applies to amended claims 1-60.

Inasmuch as previously independent apparatus claims 14, 33, 52 and 53 (in Group II) now depend from amended independent apparatus claim 1 (in Group I), and independent method claim 54 (in Group III) now recites a step of providing the apparatus of claim 1 (in Group I), the required grounds for restriction as stated by the Examiner are no longer believed to be present. However, to the extent that the Examiner believes that the restriction requirement is still

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applicable to the amended claims, the Applicants provisionally elect Group I (claims 1-13) for further prosecution on the merits.

The Applicants also note that claim 1 is a linking claim which, if allowable, will allow rejoinder of Groups II and III with Group I (see M.P.E.P. § 809).

IV. Response to Election of Species Requirement

The Examiner has identified Species A (claims 14-51), Species B (claim 52) and Species C (claim 53) as patentably distinct species of the invention, and has required that the Applicant elect a single disclosed species for further prosecution on the merits. This requirement is not understood by the Applicants, and is respectfully traversed as being contrary to the guidelines set forth in the *Manual of Patent Examining Procedure*.

The term "species" refers to different *embodiments* of the invention, not to different claims or different sets of claims defining the invention (M.P.E.P. § 806.04(e)). The Examiner has not pointed to different *embodiments* of the invention (i.e., to different drawing figures or different groups of drawing figures) which correspond to the alleged species.

Moreover, for a restriction requirement to be proper when different species are involved, the species must be *mutually exclusive* (M.P.E.P. § 806.04(f)). The species identified by the Examiner in the present case are not mutually exclusive. For example, a MEMS flow module with a movable tuning element may also have a housing and first and second flow ports. Similarly, a MEMS flow module with a housing, first and second flow ports, and a tuning element may also have a plate and a flow channel.

Finally, a proper restriction requirement among different species requires that the species be *patentably distinct* from each other. In the present case, the Examiner initially identifies Species A, B and C as patentably distinct species, but subsequently differentiates the species by referring to structural elements that are described as "not patentably distinct" from each other.

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In view of the above, the Applicants request that the Examiner's species election requirement be clarified or withdrawn. However, in order to avoid any question of nonresponsiveness, the Applicants provisionally elect what the Examiner has identified as Species A (specifically, a MEMS flow module with a movable tuning element) for further prosecution on the merits. Amended claims 1-60 are all readable on the elected species as thus defined.

V. Conclusion

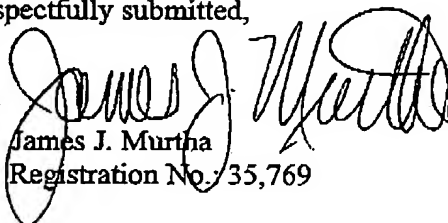
In view of the above, it is requested that amended claims 1-60 be examined on the merits. Should the Examiner have any questions, the Examiner is encouraged to contact the undersigned attorney at the telephone number indicated below.

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